

No. 1-11-1651

**NOTICE:** This order was filed under Supreme Court Rule 23 and may not be cited as precedent by any party except in the limited circumstances allowed under Rule 23(e)(1).

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IN THE  
APPELLATE COURT OF ILLINOIS  
FIRST JUDICIAL DISTRICT

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THE PEOPLE OF THE STATE OF ILLINOIS,	)	Appeal from the
	)	Circuit Court of
Plaintiff-Appellee,	)	Cook County.
	)	
v.	)	No. 08 CR 10077
	)	
HAROLD HILL,	)	Honorable
	)	James M. Obbish,
Defendant-Appellant.	)	Judge Presiding.

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JUSTICE FITZGERALD SMITH delivered the judgment of the court.  
Presiding Justice Lavin and Justice Pucinski concurred in the judgment.

**ORDER**

- ¶ 1 *Held:* The trial court did not abuse its discretion in denying defendant's motion to withdraw his guilty plea to armed robbery and aggravated kidnaping where defendant's attorney testified he advised defendant he must serve 85% of his sentence; and defendant forfeited for review his claim that no factual basis existed for his plea to aggravated kidnaping.
- ¶ 2 Following his negotiated plea of guilty to armed robbery and aggravated kidnaping while armed with a firearm, defendant Harold Hill was sentenced to two concurrent terms of 27 years in prison. On appeal, defendant asserts the trial court erred in denying his motion to withdraw his guilty plea, which was based on his claim that his trial counsel misrepresented that he would

get day-for-day good-conduct credit. Defendant also contends his aggravated kidnaping conviction must be vacated where no factual basis existed for his plea to that charge. We affirm.

¶ 3 Defendant was charged by indictment with eight felony counts, including armed robbery and aggravated kidnaping, both committed while armed with a firearm. The charges arose from an incident on May 9, 2008, at a gas station fast-food mart on South Kedzie in Chicago where the victim, Bahaa Hammood, was employed.

¶ 4 On March 16, 2010, defendant entered a jury waiver and requested a plea agreement conference under Supreme Court Rule 402 (eff. July 1, 1977). Following the conference, the court advised defendant in return for defendant's plea of guilty to count 1, armed robbery with a firearm, and count 3, aggravated kidnaping with a firearm, he would be sentenced to two concurrent 30-year prison terms. Each 30-year term included 15 years on the underlying charge plus 15 years for defendant's use of a firearm in committing the offense. Defendant entered a plea of guilty to both counts. During the change-of-plea hearing, the court stated:

"THE COURT: Is there a stipulation that the facts that were given to the court during the course of the 402 conference, including my viewing of a video which showed the actual armed robbery taking place, as well as the other facts that were related during the conference[,] is it stipulated that if those same facts and additional evidence that would be presented in open court under oath, it would support the charge of armed robbery with a firearm and aggravated kidnaping [*sic*] again with a firearm?"

The State and defense counsel so stipulated. Pursuant to the plea agreement, the court allowed the State's motion to dismiss the remaining six counts of the indictment. The court continued the case for two weeks for sentencing, during which interval defendant was allowed to remain on

bond to get his affairs in order. When defendant failed to appear on the next scheduled court date, a warrant was issued for his arrest, and subsequently he was taken into custody.

¶ 5 On April 13, 2010, defendant's trial counsel informed the court that defendant wanted to withdraw his guilty plea. Two days later, counsel filed a written "Motion to Withdraw Guilty Plea," averring that defendant's counsel had failed to explore whether defendant suffered from a mental defect that would reduce his culpability. After the court ordered a BCX evaluation of defendant, a licensed clinical psychologist and a forensic psychiatrist conducted evaluations of defendant and each reported to the court that defendant was fit to stand trial and for sentencing.

¶ 6 In the interim, Attorney Steven Weinberg substituted as defendant's trial counsel. Weinberg filed an "Amended Motion to Withdraw Guilty Plea," arguing that defendant had been found fit for trial and for sentencing but had not been evaluated for sanity at the time of the offense. A hearing was held, testimony was heard, and the motion was denied.

¶ 7 The court proceeded to sentencing, recalling that the 402 conference had resulted in an agreement that defendant would be sentenced to two concurrent terms of 30 years. During the sentencing hearing, after defendant had spoken in allocution requesting a lower sentence, the court ordered a presentence investigation (PSI) report.

¶ 8 On November 30, 2010, when the cause again came before the court for sentencing, the parties advised the court that they had reached another agreed disposition whereby defendant would plead guilty to the same two counts and the State would recommend two concurrent 27-year prison terms. The court agreed to accept the second guilty plea. Defendant executed another jury waiver and again pleaded guilty to armed robbery and aggravated kidnaping. The court advised defendant's attorney: "Now, this was a case that prior to your involvement, Mr. Weinberg, there had been a conference held. During the course of that conference when Mr. Hill was represented by other counsel a DVD was shown to the Court that was recorded by

surveillance camera at the location of the offense here. And I do believe that that certainly would provide a substantial basis for the facts of this case \*\*\*." The prosecutor offered a factual basis for the plea, stating that Bahaa Hammood would testify that he was employed at a gas station and BZ Quick Mart on South Kedzie on May 9, 2008. Defendant came into the Quick Mart at about noon, produced a handgun, and ordered Hammood to give him all the money in the cash register. After taking the money, defendant fled. Police were called to the scene, chased and apprehended defendant, recovered the stolen money, and turned it over to the Illinois State Police crime lab. A crime lab forensic scientist would testify that the DNA from blood found on the money would match defendant's DNA profile. The defense stipulated that that would be the testimony. After defendant pleaded guilty to the charges, the court stated: "A factual basis has been provided by the stipulation of facts as well as my recollection of observing the video that was taken by the surveillance camera at the time of the offense. Accordingly, Mr. Hill's plea will be accepted." The court sentenced defendant to two concurrent terms of 27 years in prison.

¶ 9 Defendant filed a timely *pro se* motion to withdraw his guilty plea. His motion asserted his counsel had failed to inform him that he must serve 85% of his sentence but in fact told him that he would serve only 50%. An assistant Public Defender was appointed to represent defendant and filed both a "Supplement to Motion to Withdraw Plea of Guilty" and a certificate pursuant to Supreme Court Rule 604(d) (eff. July 1, 2006).

¶ 10 On May 3, 2011, a hearing was held on defendant's motion. Defendant testified that he pleaded guilty based on the representation by his attorney, Steven Weinberg, that he would receive day-for-day good-conduct credit in prison because his case did not involve great bodily harm. Weinberg testified that prior to defendant's guilty plea, he had two discussions with defendant about good-time credit. Defendant thought the credit was 50% but Weinberg told him it was 85%. The first of those occasions was around October 15, 2010, when he met with

defendant at the county jail. On November 30, 2010, the day defendant pleaded guilty, Weinberg again spoke with defendant in the courtroom lock-up and told him that "there was an offer that was tendered to him that was for twenty-seven years. I told him it was ten percent less than what he was already doing and I told him that he would do eighty-five percent of that twenty-seven years." The trial court denied defendant's motion to withdraw guilty plea after finding Weinberg's testimony "extremely credible" and concluding Weinberg had informed defendant he would have to serve 85% of his sentence.

¶ 11 On appeal, defendant contends his guilty plea was entered under a misapprehension of the law because Weinberg erroneously informed him that he was eligible for day-to-day good-conduct credit, and that he pleaded guilty based on his counsel's misrepresentation.

¶ 12 The decision whether to grant or deny a motion to withdraw a guilty plea rests in the sound discretion of the trial court and, therefore, is reviewed for an abuse of discretion. *People v. Baez*, 241 Ill. 2d 44, 109-10 (2011). A defendant does not have an automatic right to withdraw a plea of guilty but must demonstrate a manifest injustice under the facts involved. *People v. Delvillar*, 235 Ill. 2d 507, 520 (2009). The trial court's decision will not be disturbed unless the plea was entered through a misapprehension of the facts or the law, or if there is doubt as to the guilt of the accused and justice would be better served by conducting a trial. *People v. Jamison*, 197 Ill. 2d 135, 163 (2001). A defendant claiming a misapprehension of the facts or the law must show the misapprehension. *Delvillar*, 235 Ill. 2d at 520.

¶ 13 Section 3-6-3(a)(2.1) of the Unified Code of Corrections sets forth the general rule that those imprisoned will be entitled to day-for-day good-conduct credit against their sentences. 730 ILCS 5/3-6-3(a)(2.1) (West 2010). The term "truth-in-sentencing" refers to a change in the statutory method which the Department of Corrections uses to calculate the amount of good-conduct credit. *People v. Davis*, 405 Ill. App. 3d 585, 602 (2010); *People v. Salley*, 373 Ill. App.

3d 106, 109 (2007). Under the truth-in-sentencing provisions, a person convicted of certain enumerated offenses, including aggravated kidnapping, would receive no more than 4.5 days of credit for each month of his sentence. 730 ILCS 5/3-6-3(a)(2)(ii) (West 2010); *Davis*, 405 Ill. App. 3d at 602. Thus, a defendant must serve at least 85% of his sentence and does not receive normal day-for-day good-conduct credit. *Salley*, 373 Ill. App. 3d at 109.

¶ 14 The record reveals that defendant's guilty plea was not rendered involuntary by any misrepresentation of his counsel. A guilty plea may be vacated where there is substantial objective proof showing that a defendant's mistaken impressions concerning the sentence he would receive were reasonably justified. *People v. Davis*, 145 Ill. 2d 240, 244 (1991).

However, "the burden is on the defendant to establish that the circumstances existing at the time of the plea, judged by objective standards, justified the mistaken impression." *Id.* In the instant case, defendant failed to meet that burden. A trial court bears the burden of assessing the credibility of witnesses who testify at a hearing on a motion to withdraw a guilty plea. *People v. Mercado*, 356 Ill. App. 3d 487, 497 (2005). Here, the court considered the evidence and the credibility of the witnesses, found Weinberg to be more credible than defendant, and concluded that defendant had been apprised before pleading guilty that the truth-in-sentencing provisions applied to him.

¶ 15 Defendant contends, however, that the court should have rejected Weinberg's testimony because Weinberg showed ignorance of the law where he testified that he thought defendant was required to serve 85% of his sentence for armed robbery. Defendant notes he would be entitled to day-for-day good-conduct credit on that charge because there was no finding by the court that the conduct constituting the charge resulted in great bodily harm to the victim. 730 ILCS 5/3-6-3(a)(2)(iii) (West 2010). While Weinberg may have been mistaken about the good-conduct credit for an armed robbery conviction, that does not detract from his credibility in testifying that

he advised defendant he had to serve 85% of his sentence. In fact, it reinforces Weinberg's testimony that defendant was told he had to serve 85%, even if it was for the wrong offense. Defendant has not shown that the trial court's determination was manifestly erroneous and, therefore, its findings will be upheld. *People v. Freeman*, 84 Ill. App. 3d 261, 265 (1980).

¶ 16 Defendant also asserts he was under the impression he would have to serve only 50% of his sentence because, "[p]ractically speaking, the parties would never devise a concurrent sentence on two counts that they believed would result in different sentences." This speculative argument, advanced without legal authority, is based on the assumption that defendant would in fact receive either the full 50% or 15% of what good-conduct credit was applicable. The court and the parties had no control as to how much time defendant would actually serve. Eligibility for good-conduct credit is a collateral consequence of a guilty plea. *People v. Frison*, 365 Ill. App. 3d 932, 935 (2006). The award of any such credit is contingent upon defendant's behavior while incarcerated. *Id.* Thus, the sentence imposed is distinct from the sentence served, which is beyond the court's control.

¶ 17 We also reject defendant's contention that he believed the 27-year sentence imposed on November 30, 2010, would be subject to day-for-day good-conduct credit because of a comment an assistant State's Attorney (ASA) had made three months earlier in relation to the 30-year sentence for which he had originally bargained. The ASA commented in passing that after defendant's original guilty plea, he had been given two weeks while free on bond to get his affairs in order, including finding daycare for his children. "I don't know \*\*\* how he was going to do that for the next 15 years of the sentence he was about to serve \*\*\*." Defendant never asserted, either in his subsequent motion to withdraw his November 30 guilty plea or in his testimony at the hearing on the motion, that the ASA's comment had any effect on his understanding of what good-conduct credit he could receive.

¶ 18 We conclude that the trial court's denial of the motion to withdraw guilty plea was not an abuse of discretion.

¶ 19 Defendant's second issue on appeal is that there was no factual basis on the record to support his plea of guilty to aggravated kidnaping, in violation of Supreme Court Rule 402(c) (eff. July 1, 1997). Neither defendant's written *pro se* motion to withdraw his guilty plea nor the written supplemental motion filed by his appointed counsel raised the issue. The State contends that defendant has failed to preserve this claim for review, citing Supreme Court Rule 604(d) (eff. July 1, 2006). Defendant asserts, however, that his appointed counsel was ineffective for failing to raise this issue in the supplemental motion to withdraw the plea.

¶ 20 When a defendant on appeal challenges the sufficiency of the factual basis the State presented to the trial court to support his guilty plea, the standard of review is whether the court abused its discretion in determining that a factual basis existed for the guilty plea. *In re Interest of C.K.G.*, 292 Ill. App. 3d 370, 376-77 (1997). The requirement of Rule 402(c), that the court determine the plea's factual basis, is satisfied if there is a basis anywhere in the record from which the court could reasonably reach the conclusion that the defendant actually committed the acts to which he is pleading guilty. See *People v. Bassette*, 391 Ill. App. 3d 453, 457 (2009).

¶ 21 Here, we find no basis for a claim of ineffective counsel because the record shows that the trial court had a sufficient factual basis for the plea of guilty to both aggravated kidnaping and armed robbery. When defendant originally pleaded guilty on March 16, 2010, the court asked whether the parties would stipulate "that the facts that were given to the court during the course of the 402 conference, including my viewing of a video which showed the actual armed robbery taking place, as well as *the other facts that were related during the conference*[,] \*\*\* that if those same facts *and additional evidence* that would be presented in open court under oath, it would support the charge of armed robbery with a firearm *and aggravated kidnaping* [*sic*] again with a



firearm?" (Emphasis added.) The defense and the State so stipulated. Generally, a defendant is precluded from attacking or otherwise contradicting any facts to which he has previously stipulated. *People v. Alsup*, 241 Ill. 2d 266, 279 (2011).

¶ 22 On November 30, 2010, during defendant's second guilty plea, the State gave a factual basis for the plea which did not encompass the aggravated kidnaping charge. However, the State's factual summary was preceded by the court's recollection of the first 402 conference when "a DVD was shown to the Court that was recorded by surveillance camera at the location of the offense here. And I do believe that that certainly would provide a substantial basis for the facts of this case." The court properly took notice of that earlier proceeding in finding that defendant actually committed the acts to which he was pleading guilty. See *People v. Kokoraleis*, 193 Ill. App. 3d 684 (1990). We conclude the trial court did not abuse its discretion in determining that a sufficient factual basis existed for defendant's plea of guilty to both aggravated kidnaping and armed robbery.

¶ 23 For the reasons stated above, we affirm the judgment of the trial court.

¶ 24 Affirmed.